were it not for such irregularity or fraud.

See the 1965 Iowa election contest of Peterson v Gross (§ 61.3, infra), where the election committee declined to order a recount and recommended dismissal of the contest, a recommendation with which the House later agreed, after finding that the contestant (who lost by 419 votes) had not clearly presented proof sufficient to overcome the presumption that the returns of the returning officers were correct. The contestant had admitted that he was not alleging fraud on the part of anyone.

§ 40.7 A committee on elections will not order a recount of ballots where the contestant has merely shown errors in the official return insufficient to change the results of the election.

In the 1934 Illinois contested election of Weber v Simpson (§ 47.16, infra), the contestee won by a plurality of 1,222 votes and the contestant requested that the committee order a recount after his examination of the tally sheets in all the 516 precincts in the district found discrepancies reducing the contestee's plurality to 920 votes. The committee denied the request, however, and rec-

ommended the adoption of a resolution that the contestee was entitled to the seat.

§ 40.8 A committee on elections refused to conduct a partial recount where contestant failed to sustain the burden of proving fraud or irregularities sufficient to change the result of the election.

In addition to failure to sustain the burden of proof of fraud as noted above, the contestant in O'Connor v Disney (§ 46.3, infra), was held not to have sufficiently demonstrated that proper custody of ballots was maintained subsequent to the election.

§ 41. Procedure

Exhaustion of State Remedies

§ 41.1 To obtain an order from the House for a recount of votes in an election contest, contestant should show that he has exhausted state court remedies to obtain a recount under state law.

In Swanson v Harrington (§ 50.4, infra), a 1940 Iowa contest, contestant claimed that certain votes had been cast by persons only temporarily within the district, and therefore unqualified, and sought an order from the

House that would require a re-count of the total vote. The Committee on Elections found that contestant had not exhausted his remedy of obtaining a recount through the state courts, as permitted by the Iowa code, prior to appealing to the committee to order a recount. The committee rejected contestant's argument that he had been precluded from invoking state court aid as the courts had not construed the relevant state election contest laws as they applied to House seats. Although the committee claimed the power to order a recount, in its discretion, without reference to state proceedings, it indicated it would not order a recount until contestant had exhausted state court remedies. [Compare Carter v LeCompte (§ 57.1, infra), a 1957 Iowa contest in which the committee expressly rejected Swanson v Harrington.]

Recounts Permitted by State Law

§ 41.2 A recount of votes may be sought pursuant to a statute requiring the secretary of state to conduct a recount at the request of either candidate.

In the 1938 New Hampshire election contest of Roy v Jenks (§ 49.1, infra), the original official returns from the Nov. 3, 1936, election gave Alphonse Roy 51,370 votes and Arthur B. Jenks 51,920 votes, a plurality of 550 votes for Mr. Jenks. On Nov. 9, Mr. Roy applied to the secretary of state of New Hampshire for a recount, pursuant to state law making it mandatory upon that official to conduct a recount upon request of either candidate.

Production of Evidence Justifying a Recount as Prerequisite

§ 41.3 The Subcommittee on Elections informed a contestant that the House would not order a recount without evidence and before testimony had been taken.

In the 1949 Michigan contested election case of Stevens v Blackney (§ 55.3, infra), the Subcommittee on Elections responded on Feb. 15, 1949, to a letter from a contestant, informing him that the House could, "on recommendation from the committee, order a recount *after* all testimony had been taken, in precincts where the official returns were impugned by such evidence." [Emphasis supplied.]

Joint Applications for Recount

§ 41.4 Joint applications for a recount received by the

Clerk of the House are communicated by him to the Speaker together with accompanying papers, and are then referred to a committee.

In the 1943 Missouri election contest of Sullivan v Miller (§ 52.5, infra), the two parties to an election contest filed a joint application proposing that the House order the Missouri Board of Election Commissioners to conduct a recount. The Clerk received this application and communicated it to the Speaker in a letter with accompanying papers from the parties. The Speaker then referred the materials to an elections committee.

Use of Auditors

§ 41.5 The actual counting and auditing of returns, on a recount of ballots by the Subcommittee on Elections of the Committee on House Administration, may be conducted by auditors from the General Accounting Office assigned to the committee.

In the 1961 Indiana investigation of the right of Roush or Chambers to a seat in the House

(§ 59.1, infra), the Committee on House Administration passed a motion directing the Subcommittee on Elections to conduct a recount of the ballots. The Subcommittee on Elections then proceeded to Indiana where the actual recount was performed by 13 auditors assigned to the committee from the General Accounting Office. The elections subcommittee prescribed the procedures that the auditors followed in conducting the recount.

Reconsideration of Action Ordering a Recount

§ 41.6 An elections committee may reconsider its action in ordering a recount of ballots and determine that such recount is not justified.

In McAndrews v Britten (§ 47.12, infra), a 1934 Illinois contest, an elections committee voted to order a recount of ballots, and funds were sought to defray the expense thereof. Subsequently, however, the committee reconsidered and decided against such a recount based on a rehearing at which contestee's objections to the recount were presented.